United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1072

To be argued by
HARRY C. BATCHELDER, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1072

UNITED STATES OF AMERICA,
Appellee,

—v.—

ROBERT SCHWARTZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Preliminary Statement

Robert Schwartz appeals from a judgment of conviction, entered on February 7, 1975, in the Southern District of New York, following a three day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 201 filed Februry 28, 1974, charged Schwartz in two counts with conspiracy to distribute cocaine and with distribution of 25.56 grams of cocaine, Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A) and 846.

Trial began on July 8, 1974, and Schwartz was found guilty on both counts by a jury on July 10, 1974.

On February 7, 1975, Schwartz was sentenced to concurrent terms of eight years imprisonment, to be

followed by six years special parole. On February 19, 1975, Schwartz's sentence was reduced to concurrent terms of three and one-half years imprisonment on each count, to be followed by three years special parole.

Schwartz is currently on bail pending appeal.

Statement of Facts

The Government's Case

On March 15, 1973, informant Robert Preston introduced Detective Michael Bramble of the New York Joint Task Force to appellant Robert Schwartz at Schwartz's apartment at 242 W. 72nd St. in Manhattan. A discussion ensued concerning the availability of heroin, and Schwartz agreed to make inquiries about it. Later that evening, in the Cooper Hatch Restaurant nearby, Schwartz told Bramble and Preston that his heroin connection was out of heroin, but that his connection sold kilos and could probably arrange such a transaction with them in the near future (Tr. 100-103).* Schwartz then indicated he could provide "factory-cut" cocaine on short notice on condition that the purchase money was shown to him (Tr. 103-4).

On March 19, Bramble and Preston returned to Schwartz's apartment. Schwartz stated he had been looking for them for the past three days because his heroin connection had brought in a heroin shipment which had by this time been sold. Schwartz stated he could obtain cocaine, handguns and a hand grenade for Bramble (Tr. 105-6). Bramble expressed his interest in purchasing some cocaine and a handgun, and it was agreed to meet the following day (Tr. 106).

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* "Tr." refers to the trial transcript.

On March 20, Bramble and Preston met Schwartz at the Copper Hatch Restaurant. Schwartz stated he did not have cocaine and would have to contact his connection (Tr. 108-9). Schwartz left to make a telephone call and came back stating that he could not contact his connection. Schwartz departed to attend to some personal matters and returned soon thereafter, stating he had called his cocaine connection but was unable to reach him (Tr. 109). Schwartz said he knew of several places in which his connection could be found and that he would try to locate him. Schwartz then left the Copper Hatch, suggesting that Bramble and Preston return later, but, as Bramble and Preston were leaving, Schwartz came back and announced that the three of them should go to 85th Street between Columbus and Central Park West and they departed in Bramble's vehicle (Tr. 110). After entering a building in that area, Schwartz returned and directed Bramble to drive to Broadway and 66th Street, where Schwartz entered 2020 Broadway and returned with co-conspirator Roger Stone (Tr. 110).

Stone,* who had been contacted earlier that day by Schwartz and asked to procure some cocaine, directed Bramble to drive him, Preston and Schwartz to 18th Street and Broadway (Tr. 48-9, 128). On arrival Stone left the car, entered 874 Broadway, and went to the apartment of one Dennis Johnson, where he procured a sample of cocaine (Tr. 33, 49-50, 77). Stone returned to the car with the sample of cocaine and, as he attempted to hand it to Bramble, who was seated in the car, Schwartz took the package, opened it, and took a snort of the contents, after which he indicated the cocaine was of good quality (Tr. 33, 85, 133). Bramble agreed to purchase the cocaine, and Stone indicated the price would be $900 for the ounce (Tr. 112). Bramble stated

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* Stone pleaded guilty and testified for the Government.

he only had $800, and Stone agreed that the $100 could be paid at some other time (Tr. 111-12). As Bramble attempted to give Stone the $800, Schwartz took the money, counted it, and added $50.00 of his own money (Tr. 89, 139, 146). Schwartz told Bramble that Bramble owed him and the connection $50.00 apiece, which Bramble agreed to pay (Tr. 112).

Stone departed and returned soon thereafter with an ounce of cocaine and some marijuana as a bonus (Tr. 112). Schwartz took the package from Bramble and insisted on testing it by snorting it. Schwartz also took the marijuana from Stone, stating he would keep it in return for his having arranged the purchase of cocaine (Tr. 78, 112-3). The parties then left the area (Tr. 35).

The Defense Case

Schwartz offered no evidence.

ARGUMENT

Judge Brieant properly denied Schwartz's motion to vacate his conviction.

Schwartz does not claim any error in the conduct of his trial. Rather, he asserts that Judge Brieant improperly denied a motion to set aside his conviction based on an alleged promise of immunity made to Schwartz by narcotics agents. The contention is without merit.

A. Proceedings Below

On September 3, 1974, prior to sentence, Schwartz moved for an order vacating his conviction, contending that at the time of his arrest he was promised by Michael

Bramble, a New York City police detective assigned to the New York Drug Enforcement Task Force, that if he cooperated with the authorities he would not be prosecuted for the offense for which he was arrested. The District Court held an evidentiary hearing on November 8, 1974, at which Schwartz, Bramble, John Pope, a Special Agent with the Drug Enforcement Administration and Bramble's superior at the time of Schwartz's arrest, and Amelio Marino, an attorney and defendant's landlord, were called as witnesses. Schwartz testified that, shortly after he was arrested, he was told by Bramble in Pope's presence that if he cooperated with the Government he "would be indicted, but not prosecuted" (7).* Marino testified that he had counseled Schwartz in connection with the Government's efforts, after Schwartz's arrest, to obtain Schwartz's assistance as an informant. Marino testified that he had met with Detective Bramble "on one or two occasions" and that Bramble had said that if Schwartz assisted in "two arrests", there "definitely would be no prosecution of Mr. Schwartz" (37-41). Marino conceded, however, that he knew Bramble had no authority to make such a promise to Schwartz (42-43).

Detective Bramble testified that he had never told Schwartz that he would not be prosecuted in return for cooperating with the Government (77). Bramble further denied ever having met with Marino and testified that, in the one telephone conversation he had had with a man identifying himself as Marino, the conversation had to do with the inadequacy of Schwartz's cooperation (79-81). Bramble testified that his understanding of his arrangement with Schwartz was that Schwartz would cooperate and later plead guilty, and

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* Parenthetical references unless otherwise noted are to minutes of the evidentiary hearing held on November 8, 1974.

that the United States Attorney's Office would bring Schwartz's cooperation to the attention of the sentencing judge. According to Bramble, Schwartz had cooperated in three cases but had ceased his cooperation when requested to participate in "one more case" (87-89).

Special Agent Pope testified that he had been present during the conversation after Schwartz's arrest between Bramble and Schwartz in which Bramble had secured Schwartz's agreement to cooperate with the Government. Pope denied that either he or Bramble had made any promise to Schwartz that he would not be prosecuted if he cooperated (49-51).

By order with opinion filed January 21, 1975, Judge Brieant denied the motion, finding that Schwartz had not been promised immunity from prosecution and that, at most, he and the agents had had an understanding that Schwartz's cooperation would be deemed complete and full if he participated in making four cases.

B. Judge Brieant's ruling was fully supported by the evidence.

Schwartz's contention on appeal appears to be a reiteration that he was promised that he would be "indicted, but not prosecuted" and that he was prejudiced by this promise because he was thereby lulled into not appearing before the Grand Jury and telling them of the promise that he would not be prosecuted.

This argument, of course, turns entirely on Schwartz's contention that he was promised by Bramble that he would not be prosecuted. Judge Brieant, having heard Schwartz's testimony and the denials under oath by Special Agent Pope and Detective Bramble that any such promise had been made, specifically found: "Defendant's contentions as to the nature and extent of his

bargain with law enforcement officials are absurd, and not supported by the credible evidence." The resolution of the conflicts in the testimony and the credibility of the witnesses was properly one for Judge Brieant, and his factual findings, fully supported by the evidence, have hardly been demonstrated to be "clearly erroneous". See, *e.g. United States* v. *Zane*, 507 F.2d 346, 347-348 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (April 14, 1975); *United States* v. *Fernandez*, 428 F.2d 578, 580 (2d Cir. 1970); *United States* v. *Hughes*, 325 F.2d 789, 792 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964). See also *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 921 (3d Cir. 1974).

Moreover, even if Judge Brieant's findings could be said to have been wrong, Schwartz is entitled to no relief. Had such a promise of immunity been made by Bramble, it would have been entirely without authority, as Marino conceded he knew when he advised Schwartz to cooperate on the strength of that alleged promise. Accordingly, in the absence of a showing that Schwartz forfeited constitutional or statutory rights in reliance on this purported promise, he is entitled to no relief. *Hunter* v. *United States*, 405 F.2d 1187, 1188-1189 (9th Cir. 1969). The only claim of prejudice that Schwartz makes is that he was lulled by the purported promise into not appearing before the Grand Jury to testify about the promise and to urge the Grand Jury not to indict him on account of it. However, that he would not be indicted was not part of the promise as Schwartz claims it was made. Moreover, Schwartz had no right to appear or testify before the Grand Jury, *United States ex rel. McCann* v. *Thompson*, 144 F.2d 604, 605-606 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944), *United States* v. *Rosen*, 259 F. Supp. 942, 944 (S.D.N.Y. 1966), *United States* v. *Elksnis*, 259 F. Supp. 236 (S.D.N.Y. 1966), or to have the Grand Jury be made aware of the purported promise and his cooperation in reliance on it.

United States v. *Del Toro*, Dkt. No. 74-2021 (2d Cir., February 27, 1975), slip op. at 1977-1978; *United States* v. *Addonizio*, 313 F. Supp. 486, 495 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

Schwartz makes one further complaint about the proceedings below. Conceding, as he must,* that it would normally have been proper for the trial judge to exclude evidence that Schwartz had been tested with a lie detector, the operators of which found "definite indications of truthfulness" in Schwartz's belief that the promise he

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* The exclusion of the results of lie detector test has been upheld by this Circuit and by every other Circuit that has considered the question. *United States ex rel. Sadowy* v. *Fay*, 284 F.2d 426 (2d Cir.), *cert. denied*, 365 U.S. 850 (1960); *United States* v. *Cochran*, 499 F.2d 380, 393 (5th Cir. 1974); *United States* v. *Gloria*, 494 F.2d 477, 483 (5th Cir. 1974); *United States* v. *Pacheo*, 489 F.2d 554, 566 (5th Cir. 1974); *United States* v. *Frogge*, 476 F.2d 969, 970 (5th Cir.), *cert. denied*, 414 U.S. 849 (1973); *United States* v. *Noel*, 490 F.2d 89, 90 (6th Cir. 1974); *United States* v. *Tremont*, 351 F.2d 144, 146 (6th Cir. 1965), *cert. denied*, 383 U.S. 944 (1966); *United States* v. *Chastain*, 435 F.2d 686, 687 (7th Cir. 1970); *United States* v. *Penick*, 496 F.2d 1105, 1109 (7th Cir. 1974); *United States* v. *Sockel*, 478 F.2d 1134, 1135 (8th Cir. 1973); *Mc Croskey* v. *United States*, 339 F.2d 895 (8th Cir. 1965); *United States* v. *Alvarez*, 472 F.2d 111, 113 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973); *United States* v. *De Betham*, 470 F.2d 1367, 1368 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973); *United States* v. *Jenkins*, 470 F.2d 1061, 1064 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *United States* v. *Salazar-Goeta*, 447 F.2d 468, 469 (9th Cir. 1971); *United States* v. *Sadrzadeh*, 440 F.2d 389, 390 (9th Cir.), *cert. denied*, 404 U.S. 850 (1971); *United States* v. *Rodgers*, 419 F.2d 1315, 1319 (10th Cir. 1969); *United States* v. *Wainwright*, 413 F.2d 796, 802 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *Marks* v. *United States*, 260 F.2d 377, 382 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); *United States* v. *Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974); *United States* v. *Zeiger*, 475 F.2d 1280 (D.C. Cir. 1972).

testified to at the hearing had in fact been made,* Schwartz claims that the trial judge should have admitted such evidence here because to do so would have resulted in dismissal of the indictment and a re-presentation of the case to the Grand Jury, before which, Schwartz contends, the lie detector evidence would have been admissible.

This argument is, of course, entirely fanciful and, not surprisingly, was not made to Judge Brieant below. It is quite insufficient to overcome the settled rule that lie detector evidence is not admissible in District Courts. It assumes that Judge Brieant would have granted the motion had he received the lie detector evidence, a notion entirely unsupported by the record and in any event doubtful because at most, as noted above, that evidence would have only tended to prove that Schwartz believed what he was testifying to, not that what he was testifying to was the fact. Finally, assuming that the lie detector evidence would have been admissible before the Grand Jury,** it was relevant only to an issue which had nothing whatever to do with a proper inquiry before the Grand Jury—whether there was probable cause to believe that Schwartz had violated the narcotics laws.

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* That is as far as the lie detector evidence went. See the letter of Scientific Lie Detection, Inc., dated July 6, 1974, to Schwartz's counsel, reproduced on unnumbered pages in Schwartz's appendix on appeal.

Significantly, the lie detector test purportedly showed "definite indications of truthfulness" in Schwartz's affirmative answer to the question whether he had been promised that he *would not be indicted* if he "gave up" two people. This was not what Schwartz swore at the hearing that the terms of the promise were.

** The Court need not reach this issue, and, for purposes of this case, the Government takes no position on it.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HARRY C. BATCHELDER, JR. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of May, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

RONALD J. VENEZIANO, ESQ.
Marino and Veneziano
167 West 72nd Street
New York, N. Y. 10023

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sworn to before me this

14th day of May, 1975

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977